HOUSE OF LORDS.

Monday, July 24.

(Before Lord Watson (in the Chair), Lord Shand, and Lord Davey.)

STEVENSON AND OTHERS *v.* STEEL COMPANY OF SCOTLAND.

(*Ante*, July 17, 1896, vol. xxxiii. p. 795, and 23 R. 1079.)

Superior and Vassal—Feu-Contract—Obligation to Make Road—Singular Successors—Jus quæsitum tertio.

In 1871 A's trustees (the first party) feued to trustees for the firm of B. & Sons (the second party), their heirs and assignees, two plots of ground forming part of the estate of Blochairn, under the "declaration and provision that a street shall be made" of 60 feet width along the south boundary of the plots, and that it should be formed upon such levels as the first party or their successors in the said lands and estate "including any parties who have feued or who may feu or purchase the ground on the opposite side of the said street," and the second party or their foresaids might think fit, "having regard to the continuation of the same eastward so as to conveniently accommodate the portion of" the first party's "remaining lands lying . . . to the east of the ground hereby feued." It was also declared that the second party and their foresaids should be bound "whenever required by the first party or their foresaids, including as aforesaid" to make the one-half of the roadway lying next to the plots disponed to the second party. It was further declared that the first party and their foresaids should be entitled to give a right to use the said road and any others that might be formed by the second party and their foresaids on the ground disponed to their feuars in the remaining parts of the lands of Blochairn, and that the second party and their foresaids should have right of access and power to use any streets which should be formed by the first party or their feuars in the remaining portions of the lands of Blochairn, and the first party bound themselves to insert clauses sufficient to secure these objects in all future conveyances of the lands of Blochairn or parts thereof.

In 1877 A's trustees sold and disponed part of the lands of Blochairn, lying to the east of the ground feued off in 1871, to C, with their "whole rights, title, and interest, present and future, therein." The disposition imposed no obligation upon the disponees to construct any road or any real burden in pursuance of the superior's obligation contained in the feu-contract of 1871.

In an action by C. to compel a successor of the firm of B. & Sons to implement their obligation to make the 60 feet road contained in the feu-contract of 1871, *held* (*aff.* judgment of the First Division) that the superiors having failed to implement their part of the mutual stipulations as to streets in the said feu-contract, neither they nor their successors were *in titulo* to enforce the counter obligations undertaken by B. & Sons' trustees.

Opinion that if the superiors under the feu-contract had retained the right to enforce the said obligations, that right would have been carried to C. by the disposition of 1877, although neither "a successor" of the superior in terms of the feu-contract of 1871, nor vested with a *jus quæsitum* under that contract.

This case is reported *ante*, *ut supra*.

The pursuer appealed.

At delivering judgment—

LORD WATSON—The Polkemmet trustees, who are not parties to this action, were at one time the proprietors, either in superiority or in full fee, of the lands of Blochairn, which lie on the north-east confines of the city of Glasgow, and are intersected by the Molendinar Burn. By a contract of feu dated in May and June, and registered in July 1871, they disponed in feu to three gentlemen of the name of Hannay, ironmasters, in trust for the firm of Hannay & Sons, two adjacent parcels of these lands, measuring about 33 and 6 acres respectively, to the north of the Molendinar Burn.

By the terms of the contract the feuars became bound to construct and open three new streets running through or along their feu from west to east, in the lines and of the width shown on a plan incorporated with the contract. Their obligation was to form the whole width of the street where shown to be upon the *solum* of their feu, and to the extent of one-half only where the other half was shown to be on the *solum* of an adjacent feuar. There was also an obligation on the feuars to make drains and sewers in these streets. It was expressly provided that in fulfilling these obligations the feuars should have regard to the continuation of the streets eastward, "so as conveniently to accommodate the portion of the first party's remaining lands lying on the north bank of the canal, and to the east of the ground hereby feued." The canal referred to is the Monkland canal, which is immediately to the south of the Molendinar Burn.

Among the rights conferred upon the superiors by the feu-contract, the following are of materiality to the present question. It is declared that the first party and their successors shall be entitled to give a right of access to and a power to use the said streets and common sewers or drains, or the portions thereof, from time to time formed, as well as any other streets and common sewers or drains which may be formed by the second party or their foresaids in the plots or areas of ground feued, to their feuars in the remaining parts and portions of their said lands of Blochairn,

or to any other parties they may think proper, without being liable in any compensation therefor to the said second party and their foresaids. On the other hand it was declared that the second party, the feuars and their successors, should have right of access and power, so far as their superiors could competently confer the same, to use all streets and common sewers or drains, or portions thereof, which had been or might be formed by the first party or their foresaids "in the remaining portions of the said lands of Blochairn," without being liable in compensation therefor to the first party or their successors or their feuars in the said lands. That power, standing by itself, would have been of no avail to the feuars of these two parcels or their successors; and therefore with a view to its future efficacy the pursuers bound and obliged "themselves and their successors to insert clauses sufficient to secure these objects in all the future conveyances to be granted by them or their foresaids of the lands of Blochairn or parts thereof."

If the scheme which was in the contemplation of the parties to the feu-contract of 1871 had been carried out, then all subsequent feu-rights or conveyances granted by the superiors, of their then unfeued lands of Blochairn, would have contained appropriate clauses, binding their feuars or disponees to allow the use of any streets, drains, or sewers constructed by them, free of charge, to all other feuars or disponees of the lands of Blochairn, including the Messrs Hannay. In the case of dispositions the lands disponed might have been burdened with a servitude of use. Had that course been followed, the streets, drains or sewers would have been common to all the feuars or disponees of the estate of Blochairn and, upon the principles recognised by this House in *Hislop* v. *Leckie* (5 App. Ca. 560), reciprocal obligations would have been constituted between each and all of the feuars and disponees, which would have entitled a single feuar or disponee to vindicate his own right of user. But the obligation which the superiors undertook has never been fulfilled.

By disposition, dated the 14th and 15th, and registered the 17th day of May 1877, the Polkemmet trustees, in consideration of the price of £48,446, 17s. 6d., sold and disponed to William Stevenson, James Watson, and Robert M'Cord, and the survivors or survivor of them and the heir of the last survivor, as trustees and trustee for behoof of themselves, in equal portions, and their respective heirs, all their lands of Blochairn extending to nearly 93 acres lying to the east of the Hannays' feu and to the north of the Molendinar Burn, together with their whole right, title, and interest therein. The conveyance did not burden the lands with any servitude or right of use in favour of the Hannays or other feuars or disponees of portions of the estate of Blochairn. It is not disputed that the appellants, the pursuers of the present action, are now heritably vested in the lands and rights which were conveyed by the foresaid disposition.

In May and June 1890, after the bankruptcy of the firm of Hannay & Sons and its individual partners, the trustee and commissioners on their sequestrated estates executed a deed of renunciation, by which they conveyed and disponed to the Polkemmet trustees the whole interest of the bankrupts in the lands feued by the contract of 1871, with the exception of an area of 2 acres 1 rood $30\frac{5}{10}$ poles, part of the smaller parcel of about 6 acres which had been conveyed under a contract of ground-annual to one William Edwin Jackson. In November 1890 the Polkemmet trustees executed and recorded a minute of consolidation by which they merged into one estate the superiority which had all along been their property and the feu-farm fee which had been recently resigned to them. Questions have been raised on the record as to the validity of the consolidation; but these it is in my opinion unnecessary to discuss, because consolidation by the superior of his superiority with the feudal fee, although it extinguished all rights and claims as between the two estates, could not affect any interests in or burdens upon the fee which had been previously created in favour of other lands whether held in superiority or fee. In November 1890 the Steel Company of Scotland, Limited, the respondents in this appeal, acquired by disposition from the Polkemmet trustees their whole remaining interest in the lands of Blochairn, including the superiority and also the fee of the lands which had been feued to the Hannays.

The present action was brought in October 1895 by the appellants, who were at that time vested with the *plenum dominium* of that portion of the lands of Blochairn which is situated to the east of the parcels constituting Hannays' feu, against the respondents, who had become the owners either in superiority or feu, or both, of the whole remaining lands included in the estate of Blochairn. The conclusions of the actions were to have it found and declared that the respondents were bound forthwith to form and open two streets, shown respectively as A, B, C, D, and C, E, F, upon the plan incorporated with the feu-contract of 1871 between the Polkemmet trustees and the Messrs Hannay, with pavements on each side thereof, and with common sewers and drains therein, of such character as the Court may determine, having regard to the convenience and those portions of the lands of Blochairn in which the appellants were heritably vested.

The Lord Ordinary (Low), on the 21st May 1896 sustained the second plea stated in defence by the respondents, to the effect that the appellants had no title to sue; and assoilzied the respondents from the conclusions of the action with expenses. On a reclaiming-note the learned Judges of the First Division unanimously affirmed the judgment of the Lord Ordinary, and found the respondents entitled to additional expenses.

The object of the action is to compel fulfilment by the respondents of certain

obligations which were undertaken by the Messrs Hannay in the feu-contract of 1871 to the Polkemmet trustees, their superiors —obligations which, if fulfilled, would be of advantage to the area to the east of the feu, which was acquired *in pleno dominio* by the appellants from the Polkemmet trustees in the year 1877. In order to entitle the appellants to have decree in terms of their summons, it must be shown, in the first place, that these contract-stipulations continued to be obligatory, and could have been enforced against their vassals by the Polkemmet trustees before May or June 1890, when the vassals' right was renouuced in their favour; and in the second place that the appellants by virtue of the feudal title which they acquired in 1877, either taken *per se* or in connection with the terms of the feu-contract of 1871, have a legal title to enforce the obligations upon which they rely. If one or other of these propositions fails, there is an end of the appellants' case.

So far as I understood the argument for the appellants, their alleged title to enforce, in so far as calculated to benefit their lands, the stipulations of the feu-contract of 1871 was rested upon three separate grounds— the first being that they are the "successors" of the Polkemmet trustees within the meaning of the feu-contract; the second, that according to the principles approved by this House in *Hislop* v. *Leckie* (5 App. Ca. 560), they must be held to have acquired a *jus quæsitum* which enables them to compel performance of these stipulations, although not directly conceived in their favour; and the third, that the disposition of 1877 being an onerous deed with absolute warrandice against the Polkemmet trust estate, operated as a conveyance or assignation to them of all minor rights and obligations, whether personal or real, in or connected with the lands disponed, which were vested or competent to their authors the Polkemmet trustees.

These three propositions, and the arguments by which they were supported, do not require to be considered if it be assumed or held that the feu obligations or stipulations in question were not subsisting or enforceable at the time when the appellants obtained their title to the eastern portion of the lands of Blochairn. Seeing, however, that these matters have been dealt with in the Courts below, I think it may be convenient to make the following observations with regard to them. It appears to me that a direct title to enforce these stipulations in the character of successors of the Polkemmet trustees is not, by the terms of the feu-contract, conferred upon any person or persons who have not acquired from the original superiors, the Polkemmet trustees, or by progress from them, their right to the superiority of the lands feued to the Hannays. As regards the second point, whilst it appears to me that there may be a *jus quæsitum* arising to disponees, as well as to feuars, where there are reciprocal obligations between them, I am of opinion that there are no circumstances to be found in the present case from which such a right can be inferred. So far as concerns the third point, I am of opinion that the argument addressed to us for the appellants was entirely consistent with authority, and I need only refer to the doctrine laid down by Lord Stair (Inst. i. 10, 5), and by Mr Erskine (Inst. ii. 71, 2 *et seq.*), which has, so far as I am aware, never been modified or controverted. If, therefore, there had been at the time when the appellants obtained their title to the eastern portion of the lands of Blochairn, lying to the north of Molendinar Burn, an outstanding obligation in the feu-contract of 1871, connected with the lands disponed to them, for the benefit of these lands if fulfilled, and enforceable by their authors as superiors under the feu-contract, it appears to me that the disposition of 1877 would have operated as a conveyance or assignation to them of their authors' right to sue the feuar of 1871 upon his obligation.

I come now, although not its logical sequence, to the first proposition, which, as already indicated, I conceive it to be necessary for the appellants to establish, not only as the groundwork of their success on the merits, but of their title to sue. It is obviously a somewhat idle proceeding to discuss the question whether a pursuer has a title to enforce an obligation if there be no existing obligation capable of being enforced.

By the law of Scotland a contract or disposition in feu, although its subject-matter be land, or heritable rights in land, is governed in many, if not all, important respects by the same equitable rules which apply to personal contracts. In such deeds it is usual for the feuar, as a condition of his tenure, to undertake obligations similar to those which were imposed upon the Hannays and their successors in the feu by the contract of 1871. It is, in like manner, matter of common practice for the superior to undertake, on behalf of himself and his successors, obligations in favour of the feuar and his successors in the feu. These obligations between the superior and his vassal are rightly regarded as the counterparts of each other. That is eminently the case with respect to those stipulations and obligations in the feu-contract of 1871, which relate to the making and use of streets, drains, and sewers in the lands feued. The obligation of the Hannays, the feuars, is to make these streets, drains, and sewers, and to allow all the other feuars of the lands of Blochairn to use them. But the condition upon which that obligation is undertaken, and upon the fulfilment of which it depends, is that the superior shall in all future feu-rights of the lands of Blochairn insert clauses binding the feuars to give the Hannays a similar right to use all streets, drains, and sewers constructed by them. It is true that the superior professes to give the Hannays a right to use such streets, drains, or sewers, but that privilege would have been utterly ineffectual unless it was made a burden upon other feuars whose feudal right it affected.

The immediate effect of the superior's granting in 1877 an unqualified disposition

to the appellants of their lands to the east of the Hannays' feu was to disable them from fulfilling to the Hannays and their successors in the feu the condition or counterpart obligation, in respect of which they had undertaken to give to the feuars of the lands, now belonging in full property to the appellants, the right to use the streets, drains, and sewers constructed by them upon their own feu. Accordingly, in the same moment in which they executed the disposition of 1877 in favour of the appellants, the superiors ceased, in my opinion, to have any right or title to enforce that obligation against their feuars of 1871.

For this reason I am of opinion that the interlocutor appealed from ought to be affirmed with costs.

LORD SHAND—I also am of opinion that the decision of the Lord Ordinary and of the First Division of the Court of Session should be affirmed and the appeal dismissed.

The ground of judgment is, I think, short, simple, and clear, and is at once an answer to the appellants' case, both on the question of their title to sue and on their claim on its merits. For in this case, as there is no direct feudal relation between the appellants and respondents, even the title of the appellants to sue depends on their being able to show that their authors could enforce the obligations for which they ask decree, in which case, though they have no direct assignation of these obligations, they might, as my noble and learned friend Lord Watson has said, on the authority of Lord Stair and Mr Erskine, have successfully maintained that the obligations having been granted for the benefit of their lands, the disposition of 1877 gave them right to enforce these obligations.

But had the appellants' authors any such right? The obligations which the defenders' authors undertook to make the roads or streets and sewers in question were contained in a contract of feu, with mutual and reciprocal stipulations and obligations, having for their object not only the benefit of the land feued to the Messrs Hannay, a great part of which is now the property of the defenders, but also the benefit of the large remaining property adjoining, belonging to the Polkemmet trustees. The ground feued to the defenders' predecessors was part of a larger tract which it was contemplated and in substance arranged should be feued on a general scheme or plan with continuous streets and drains; and while on the one hand the Messrs Hannay bound themselves to make the streets, drains, and sewers in question, the counterpart or reciprocal obligation of the superiors, in respect of which alone the Messrs Hannay undertook what they did, was that the feuars of the rest of the ground should be taken bound to make the remaining and continued line of streets, drains, and sewers, which would of course be of value, and indeed essential, to the Messrs Hannay in the enjoyment of their property and for the real and complete use of their own streets and drains, as both parties contemplated.

What then happened thereafter? The superiors in 1877 parted with the remainder of their lands of Blochairn, and not only thereby disabled themselves from making the continued lines of streets and drains, which were an essential part of the scheme on which the Hannays were entitled to rely, but gave no right to enforce the right to have these streets made by the new purchasers, for they took no obligation from these purchasers to make these continued lines of streets and drains. It follows that neither the superiors nor their disponees, now represented by the pursuers and appellants, can have any right to enforce the obligations which are the subject of the action. Having rendered themselves incapable of fulfilling their part of the contract in the very matter of the streets and drains, they and those deriving right from them cannot enforce the counterpart of the contract, *i.e.*, the reciprocal obligation undertaken by the defenders' authors, the obligations being mutual and dependent on being fulfilled by one party as well as the other.

LORD DAVEY—I concur.

Interlocutor appealed from affirmed with costs.

Counsel for the Appellants—The Dean of Faculty (Asher, Q.C.) — Guy. Agents — Brooks, Jenkins, & Co., for Macandrew, Wright, & Murray, W.S.

Counsel for the Respondents—The Lord Advocate (Graham Murray, Q.C.)—J. A. Fleming. Agents — John Kennedy, for Tods, Murray, & Jamieson, W.S.

Monday, July 24.

(Before Lord Watson (in the Chair) and Lords Shand and Davey.)

TEACHER *v.* CALDER.

(*Ante*, February 25, 1899, vol. xxxv. p, 517, and 25 R. 661).

Accounting — Agreement for Audit — Whether Audit in Terms of Agreement —Error.

A advanced £15,000 to B, to be used in B's business for a period of five years, receiving in return, besides interest, three-eighths of the profits. It was agreed that B's books should be audited annually by a particular firm of accountants, whose certificates as to the amount of profits were to be binding on both parties. Notice of this agreement and of its terms was given by A to one of the partners of the firm of auditors, but they were not communicated by him to the partner who actually conducted the audit. While aware that A had an interest in the profits, the latter did not know the terms of the agreement, and in particular did not know that his audit was intended to bind the parties.

In an action for a judicial accounting